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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH D. QUINTANA, Defendant and Appellant.	A151801 (City & County of San Francisco Super. Ct. No. SCN227117)

A jury found defendant-appellant Joseph D. Quintana guilty of resisting an executive officer (Pen. Code,[1] § 69, count 1), resisting, obstructing, or delaying a peace officer (§ 148, subd. (a)(1), count 2), and driving with suspended or revoked driving privileges (Veh. Code, § 14601.1, subd. (a), count 3).

Quintana appeals and raises four issues: (1) counts 1 and 2 must be reversed because the trial court gave a modified version of CALCRIM No. 2670 that lowered the prosecution's burden of proof on the issue of the officers' lawful performance of their duties; (2) counts 1 and 2 must be reversed because the modified version of CALCRIM No. 2670 given was argumentative; (3) all counts must be reversed because the trial court prejudicially erred in admitting evidence of uncharged misconduct pursuant to Evidence Code section 1101, subdivision (b); and (4) count 2 must be reversed because it was a lesser included offense of count 1, thus multiple convictions were barred.

We reject these arguments and affirm.

[1] Further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

San Francisco police officers Santiago and Reynoso were in uniform and on patrol when they approached an Audi parked on the street after their patrol car's license plate reader indicated the Audi was wanted in connection with a felony. Quintana was asleep in the driver's seat and property was strewn about inside the car. Santiago, who knew nothing about the felony associated with the Audi or Quintana, called for backup. Backup arrived, and the officers positioned their marked cars close to the Audi to discourage its potential flight. Santiago knocked on the driver's side window to wake Quintana. While he was doing so, Sergeant Silver and another sergeant, who were in plain clothes, arrived and parked their unmarked car on the driver's side of the Audi to further block it. Sergeant Silver also did not know the nature of the felony associated with the Audi but thought Quintana might be someone known for engaging in violence against police.

Eventually, Quintana awoke. He looked at Officer Santiago and sat up from his reclined position. Santiago immediately and repeatedly told Quintana to open the door and, after about 10 seconds, lifted up his baton and indicated he would break the window. Quintana did not open the door. Instead, he stalled by stretching, looking around, and mouthing that he would open the door without actually doing so. Santiago could not clearly see Quintana's hands but saw him reach down, which caused Santiago concern that Quintana might be armed. About 30 seconds after initially knocking on Quintana's window, Santiago hit the window with his baton but did not break it. Other officers nearby yelled for Quintana to open the door. Sergeant Silver, who had his badge out to identify himself as an officer, stood behind Santiago with his gun drawn and pointed in Quintana's direction to provide cover.

Quintana started the Audi and, simultaneously, another officer successfully shattered the driver's side window. Apparently undeterred, Quintana revved the engine loudly and rammed into the police SUV in front of him. Then he backed up, hit the car behind him, and again rammed the police SUV in front of him. Concerned that Quintana's escape could lead to a dangerous car chase, Sergeant Silver drove his

unmarked police car into the Audi to pen it in. Another officer then pepper sprayed Quintana through the broken window and the officers pulled him out of the car. Quintana stiffened his arms to resist being handcuffed.

DISCUSSION

I. The Modified Version of CALCRIM No. 2670 Did Not Lower the Prosecution's Burden of Proof on the Issue of the Officers' Lawful Performance of Their Duties

An element of section 69 and section 148, subdivision (a)(1) obstruction charges is that the victim officer be lawfully engaged in the performance of his or her official duties. (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1109, fn. 5.) CALCRIM No. 2670 is the pattern instruction on lawful performance of duties by a peace officer. The trial court instructed the jury with No. 2670 with the addition of the following language requested by the prosecutor[2]: "Force is not excessive if it is reasonably necessary under the circumstances to detain or arrest. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You may consider the following among other factors: [¶] (a) Whether defendant reasonably appeared to pose an immediate threat to the safety of the officers or others; [¶] (b) The seriousness of the crime at issue; [¶] (c)Whether defendant was actively resisting detention; and [¶] (d) societal norms. [¶] This list of factors is not exclusive but rather suggestive." The prosecutor derived this language from CACI No. 3020, that was based on *Graham v. Connor* (1989) 490 U.S. 386 (*Graham*), a case that elaborated the standard for determining whether force used to affect a seizure is "reasonable" under the Fourth Amendment. (*Graham*, *supra*, 490 U.S. at pp. 396-397.) The factors listed in the prosecutor's proffered language as (a), (b), and (c) are often referred to as the "*Graham*

[2] A paragraph requested by defense counsel defining "arrest" and "detention" and the enumerated purposes of a detention was also inserted into the pattern CALCRIM No. 2670 instruction. Otherwise, the instruction given was faithful to the pattern instruction.

factors." (See Directions for Use of CACI Nos. 440 & 3020; *People v. Brown* (2016) 245 Cal.App.4th 140, 168-169.)

Quintana argues the tailored language the trial court added upon the prosecutor's request "introduced a justification defense and implicitly shifted the burden of persuasion to [the defense] to prove that the officers' actions were not justified" in violation of his due process rights. We disagree.

" 'In deciding whether an instruction is erroneous, we ascertain at the threshold what the relevant law provides. We next determine what meaning the charge conveys in this regard. Here the question is, how would a reasonable juror understand the instruction. [Citation.] In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly.' [Citation.] 'The test is whether there is a "reasonable likelihood that the jury . . . understood the charge" in a manner that violated defendant's rights.' " (*People v. Pearson* (2013) 56 Cal.4th 393, 476; see *People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 (*Dieguez*) [stating that the determination of a claim of instructional error requires consideration of the instructions given, the entire record of trial, and the arguments of counsel].) We determine whether a jury instruction correctly states the law under the independent standard of review. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

"[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (*Patterson v. New York* (1977) 432 U.S. 197, 210.) A jury instruction that fails to give effect to that requirement violates due process. (See *People v. Mills* (2012) 55 Cal.4th 663, 677.)

Here, the first sentence of CALCRIM No. 2670 began by telling the jurors: "The People have the burden of proving beyond a reasonable doubt that [the officers] were lawfully performing their duties as peace officers. If the People have not met this burden, you must find the defendant not guilty of Resisting an Executive Officer in Performance of Duty [count 1] and Resisting a Peace Officer [count 2]." The language added to

CALCRIM No. 2670 that Quintana presently complains about did not mention, much less alter, this burden of proof. The language merely asserted that force is not excessive when it is reasonably necessary to effect a seizure, it set out an objective standard for deciding if an officer used reasonable or excessive force, and it set out four non-exclusive factors the jurors could consider to determine if an officer's force was reasonable or excessive. Considering the instruction, there is no reasonable likelihood the jury understood CALCRIM No. 2670, as modified, shifted the burden of proof.

Quintana next asserts "[t]he instruction given was limited to the federal standard for violations of the Fourth Amendment, rather than allowing the jury to consider the broader question of what is unlawful under California law." Quintana states: "Under California law, 'the reasonableness of a peace officer's conduct must be determined in light of the totality of circumstances.' [Citation.] This totality of circumstances includes conduct and decision-making prior to the use of force which might render an otherwise reasonable use of force unreasonable. [Citation.] Conduct prior to the use of force should be considered in relation to the question whether the officers' ultimate use of force was reasonable."

Quintana does not cite any authority to support this argument. Nor does he clearly explain how an instruction including considerations from state negligence law would have differed from the one given here.[3] His only specific assertion is that "[c]onduct

[3] Notably, CACI No. 440 is a pattern civil jury instruction used when a plaintiff makes a negligence claim under state law concerning an officer's use of force in effecting an arrest or detention. It contains language that is materially similar to the tailored language the prosecutor in this case requested and includes the *Graham* factors. The relevant portion of the instruction reads, as follows: "In deciding whether [name of defendant] used unreasonable force, you must consider all of the circumstances of the [arrest/detention] and determine what force a reasonable [insert type of peace officer] in [name of defendant]'s position would have used under the same or similar circumstances. Among the factors to be considered are the following: [¶] (a)Whether [name of plaintiff] reasonably appeared to pose an immediate threat to the safety of [name of defendant] or others; [¶] (b)The seriousness of the crime at issue; [and] [¶] (c)Whether [name of plaintiff] was actively resisting [arrest/detention] or attempting to avoid [arrest/detention]

prior to the use of force should be considered in relation to the question whether the officers' ultimate use of force was reasonable." To the extent Quintana argues the instruction erroneously failed to include "conduct prior to the use of force" as one of the factors the jurors should consider when deciding whether the officers used reasonable or excessive force, his failure to ask for an amplifying instruction in the trial court forfeits this claim on appeal. "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024 (*Lang*).)

Even on the merits, the argument fails. CALCRIM No. 2670 as given in this case told jurors they should consider "evidence of the officer's training and experience and all the circumstances known by the officer when he or she detained [or arrested] the person" in deciding whether a detention or arrest was lawful. Additionally, the arguments of counsel clearly told jurors to consider the totality of the circumstances, including Quintana and the officers' conduct leading up to the use of force, when deciding the lawful performance element of counts 1 and 2. (See *Dieguez, supra,* 89 Cal.App.4th at p. 276.) The prosecutor and defense counsel argued at length about whether the circumstances leading up to the use of force justified the degree of force used, and they discussed evidence concerning the officers' training and police department use of force policy. Moreover, the prosecutor told jurors the factors listed in CALCRIM No. 2670 were not exclusive. Similarly, defense counsel told the jurors they could consider *anything* they thought would be appropriate in determining whether the force used was reasonably necessary or excessive. Given this record, it is not reasonably likely the jurors would have believed the conduct of Quintana and the officers leading up to the use of force could not be taken into account when deciding whether the force used was reasonable.

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by flight[; and/.] [¶] [(d)[Name of defendant]'s tactical conduct and decisions before using [deadly] force on [name of plaintiff].]"

Next, Quintana argues the trial court erred by instructing the jury to determine whether the force used was reasonable by considering the force a reasonable officer on the scene would have used in the same or similar circumstances. Quintana asserts "[w]hat was at issue was whether *these* officers' actions were lawful under *these* circumstances, not whether they were lawful under similar circumstances." (Italics in original.) As the People suggest, the argument and import of Quintana's double emphasis is unclear. Quintana also fails to cite authority supporting this claim. Absent clear argument supported by authority, we consider the claim waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 (*Stanley*).)

Quintana goes on to claim that directing the jury to consider the hypothetical reasonable *officer's* point of view, rather than the hypothetical reasonable *person's* point of view, reduced the prosecution's burden of proof. We consider this also waived because it is unclear and underdeveloped. Quintana does not explain, nor is it apparent, why he believes considering an *officer's* point of view rather than a reasonable *person's* point of view would impact the People's burden of proof or otherwise be improper. (*Stanley*, *supra*, 10 Cal.4th at p. 793.)

II. The Modified Version of CALCRIM No. 2670 Was Not Argumentative

Quintana contends: (i) the modified version of CALCRIM No. 2670 was argumentative because it attempted to draw the jury's attention to particular aspects of evidence favorable to the prosecution, rather than generally stating a principle of law for the jury to apply; (ii) the instruction did not include important and specific evidence favorable to the defense; and (iii) the instruction erroneously told the jury to consider the seriousness of the crime as a factor in evaluating excessive force, because that factor was inapplicable to the officers' initial applications of force in hitting and breaking the car window.

We disagree. "A jury instruction is argumentative when it is ' "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." ' " (*People v. Lewis* (2001) 26 Cal.4th 334, 380.) A court can refuse instructions that highlight "specific evidence as such" because such instructions invite the

jury to draw inferences favorable to one side. (*People v. Earp* (1999) 20 Cal.4th 826, 886 (*Earp*).) The modified version of CALCRIM No. 2670 used here was neutral, did not mention specific evidence, and gave the jury non-exclusive factors derived from *Graham* to assess if the officers used excessive force. Moreover, CALCRIM No. 200 told jurors that some instructions may not apply depending on the jury's findings. The jurors were also told they should not assume the court was suggesting anything about the facts because it gave a particular instruction, and the jury should decide the facts and follow those instructions that apply.

We also reject Quintana's claim that the instruction did not include important and specific evidence favorable to the defense. The inclusion of specific trial evidence would have made the instruction argumentative. (*Earp, supra,* 20 Cal.4th at p. 886 ["Upon request, a trial court must give jury instructions 'that "pinpoint[]the theory of the defense," ' but it can refuse instructions that highlight ' "specific evidence as such." ' [Citations.] Because the latter type of instruction 'invite[s] the jury to draw inferences favorable to one of the parties from specified items of evidence,' it is considered 'argumentative' and therefore should not be given."].)

To the extent Quintana claims the instruction should have told the jury to consider additional factors in determining whether the officers used excessive force—namely, the availability of less intrusive means and Quintana's mental and emotional state—his failure to ask for amplifying instructions forfeited this claim on appeal. (*Lang, supra*, 49 Cal.3d at p. 1024.)

Even if we consider the substance of this claim, Quintana fails to show error. These additional factors were implicit in CALCRIM No. 2670, which told the jury an officer could use only reasonable, not excessive force, and provided non-exclusive factors to guide that determination, such as "[w]hether defendant was actively resisting detention." As discussed above, counsels' arguments clearly conveyed that the availability of less intrusive means and Quintana's mental and emotional state were relevant to the lawful performance element of counts 1 and 2. (See *Dieguez, supra*, 89 Cal.App.4th at p. 276.) Considering the instruction and arguments, no reasonable jury

would have believed it could not consider the availability of less intrusive means and Quintana's mental and emotional state in making its determination.

Quintana's contention the instruction erroneously told the jury to consider the seriousness of the crime because it had no bearing on the officers' initial applications of force is meritless. " 'Giving an instruction that is correct as to the law but irrelevant or inapplicable is error' " reviewed for harmless error under *Watson*. (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1247.) Here, although Quintana asserts the officers did not know the nature of the crime associated with the Audi, the officers at least knew that it was a *felony*. The officers also knew Quintana resisted their orders to open his door, thereby preventing further investigation and supplying probable cause to believe Quintana was violating section 148. Even assuming arguendo the seriousness of the crime was inapplicable to the officers' initial decision to use force to break the car window, it was not prejudicial in light of Quintana's behavior in ramming the police vehicles with his car.

III. The Trial Court Properly Admitted Evidence of the Santa Clara Incident Pursuant to Evidence Code section 1101, subdivision (b)

Pursuant to Evidence Code section 1101, subdivision (b), the trial court admitted evidence of an uncharged incident that occurred in Santa Clara County the day before the officers encountered Quintana. Specifically, a police officer from the City of Santa Clara testified he noticed an Audi with foggy windows in a parking lot at 1:00 a.m. and contacted the driver, Quintana. The officer checked Quintana's driver's license, which came back with two warrants. When he informed Quintana of the warrants and tried to take him into custody, Quintana became belligerent, complaining he was getting arrested every two weeks for something and refused to exit his car. The officer opened Quintana's door and another officer grabbed him. Quintana started his car and accelerated away. The officer holding onto Quintana ran 8 to 10 feet with the moving car before letting go and probably would have been run over if he fell.

Quintana now argues the trial court erred when it admitted the evidence under Evidence Code section 1101, subdivision (b), and section 352.

Evidence Code section 1101, subdivision (a), prohibits the admission of character evidence if offered to prove conduct in conformity with that character trait, but subdivision (b) provides for the admission of uncharged acts when relevant to prove some fact other than predisposition, such as motive, intent, or knowledge. (Evid. Code, § 1101.) We review the admission of evidence under Evidence Code section 1101, subdivision (b) for an abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

Here, the Santa Clara incident was highly probative to show Quintana's motive to resist the San Francisco officers' attempts to detain him. The Santa Clara incident was also relevant to show Quintana knew the San Francisco officers were performing their duties, an element of both counts 1 and 2, since he forcibly resisted police efforts to take him into custody just the day before with the same car. (See CALCRIM Nos. 2652 & 2656.) A defense theory at trial was that Quintana did not know why the officers were contacting him.

Quintana contends the Santa Clara incident "was not probative of his awareness that the people who surrounded and woke him in San Francisco were peace officers or that he knew their conduct was lawful.' " Even assuming this is true, whether or not the uncharged incident was probative to prove some points does not detract from its relevance to prove others.

Evidence of uncharged conduct may also be subject to exclusion under section 352. (*People v. Branch* (2001) 91 Cal.App.4th 274, 281.) Analysis under section 352 entails a balancing of the probative value of the evidence against four factors: "(1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses." (*Id.* at p. 282.) We review a challenge to a trial court's decision to admit evidence under section 352 for abuse of discretion. (*Ibid.*)

In this case, Quintana fails to show an abuse of discretion. The Santa Clara incident was not particularly inflammatory and, as the trial court noted, it seemed no more egregious than the charged incident. Second, nothing in the record suggests the

introduction of the Santa Clara incident confused the jurors in any way. Instead, the record shows the trial court specifically instructed the jury with CALCRIM No. 375 that it could use the uncharged incident *only* to determine whether Quintana had a motive to commit the charged offenses or knew the San Francisco officers were performing their duties. The same instruction told the jury not to consider the uncharged incident for any other purpose and specifically not to conclude Quintana had a bad character or was disposed to criminal behavior. A separate instruction, CALCRIM No. 303, told the jury to consider evidence admitted for a limited purpose only for that purpose and no other. (See *People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 861 [stating reviewing courts presume jurors follow instructions].) Third, the Santa Clara incident occurred just one day before the arrest in this case. Fourth, the time consumed by the evidence of the Santa Clara incident largely consisted of one officer's testimony, which constituted only a small portion of the trial.

Quintana asserts the defense's offer to stipulate to the existence of the warrants and his knowledge of them weighed in favor of exclusion because this would have reduced the probative value of the uncharged incident and rendered it cumulative. Not so. The evidence was also probative to show Quintana had a motive to resist the San Francisco officers and likely knew why the San Francisco officers had reason to contact him. Additionally, Quintana cites no authority that the People were obliged to accept his proposed stipulation. " ' "The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." ' " (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49.)

Finally, on this point, Quintana argues the instruction for the Evidence Code section 1101, subdivision (b) evidence permitted the jury to find an element of the charged crimes true by a preponderance of the evidence rather than beyond a reasonable doubt. We disagree.

Here, the trial court used CALCRIM No. 375 to instruct regarding the Evidence Code section 1101, subdivision (b) evidence. Nowhere does that instruction tell the jury

it may rest a conviction solely on evidence of uncharged offenses found true by a preponderance of the evidence. Instead, that instruction specifically limited the preponderance-of-the-evidence standard to the "uncharged acts" and then limited how the jurors could use those acts. The instruction explicitly told the jury: "If you conclude that the defendant committed the uncharged acts, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Resisting an Executive Officer or Resisting a Peace Officer. The People must still prove each charge beyond a reasonable doubt." It is not reasonably likely the jurors understood the instructions as authorizing a guilty verdict based solely on proof of the uncharged conduct by a preponderance of the evidence. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1013, 1016.)

IV. The Convictions for Counts 1 and 2 Did Not Run Afoul of the Bar Against Multiple Convictions

Quintana relies upon *People v. Pearson* (1986) 42 Cal.3d 351[4] (*Pearson*) to argue his convictions for counts 1 and 2 violated the bar against multiple convictions for necessarily included offenses. We are unpersuaded. *Pearson* supports the proposition that "multiple convictions may *not* be based on necessarily included offenses." (*Pearson, supra,* 42 Cal.3d at p. 355, italics in original.) But that general proposition does not resolve the issue. The test for determining whether an offense is necessarily included in another for purposes of applying the bar against multiple convictions is the statutory elements test. (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.) "Section 148(a)(1) is not a lesser included offense of section 69 based on the statutory elements of each crime." (*People v. Smith* (2013) 57 Cal.4th 232, 240–242.) Quintana cites no authority to support a contrary conclusion.

Finally, Quintana claims he has been punished in violation of the "Double Jeopardy Clause of the Fifth Amendment [that] bans multiple punishments for the same

[4] *Pearson* was overruled on other grounds in *People v. Vidana* (2016) 1 Cal.5th 632, 651.

offense in the same proceeding." This claim fails because when proceedings are suspended without imposition of sentence and a defendant is placed on probation, no punishment has been imposed. (See *People v. King* (1963) 218 Cal.App.2d 602, 611 ["Inasmuch as proceedings were suspended without imposition of sentence and the defendant placed on probation, no question of double punishment of the defendant for his conduct is involved."].) In this case, the trial court did not impose sentence on Quintana; the trial court suspended imposition of a sentence and put him on probation, an act of clemency, not punishment.

DISPOSITION

The judgment is affirmed.

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Siggins, P.J.

We concur:

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Jenkins, J.

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Fujisaki, J.